IN THE SUPREME COURT OF MISSOURI

SC 086712

STATE OF MISSOURI ex rel. AMOCO OIL COMPANY, now known as BP PRODUCTS NORTH AMERICA INC.,

Relator/Defendant,
vs.

THE HONORABLE JOHN J. RILEY
CIRCUIT JUDGE, 22nd JUDICIAL CIRCUIT, MISSOURI,

Respondent.

BRIEF *AMICUS CURIAE* OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF RELATOR

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INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association of corporate members representing a broad cross-section of American and international product manufacturers. A list of PLAC's corporate members is included in the Appendix. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the common law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership spanning a diverse group of industries in various facets of the manufacturing sector. In addition, a select group of the leading product liability defense attorneys participate in PLAC on an invitation-only basis.

PLAC'S primary purpose is to file *amicus curiae* briefs on issues that affect the development of product liability law and impact PLAC's members. Since 1983, PLAC has filed more than 550 briefs as *amicus curiae* in state and federal courts presenting the broad perspective of product manufacturers seeking fairness in the application and development of product liability law. The issue before the Court is of significant concern to the many members of PLAC involved in product liability litigation in both Missouri and throughout the United States. PLAC is acutely aware of the practical implications of broad, inflexible discovery orders, such as those in this case, that would require businesses to produce an overwhelming volume of electronic documents without first having had a reasonable opportunity to review them for relevance, privilege, confidential or proprietary information, and company and employee property and privacy concerns. As a representative of wide-ranging industry groups, PLAC respectfully

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submits this brief to help inform the Court of some of the legal and public policy ramifications of Respondent's discovery orders in deciding this matter.

CONSENT OF THE PARTIES

Amicus Curiae has received written consent from Relator Amoco Oil Company, now known as BP Products North American Inc. ("BP") to file this Brief. (*See* e-mail correspondence from Ms. Dawn Johnson, attached as A-6.) Respondent did not consent to the filing of this Brief. (*See* correspondence from Plaintiffs' counsel Mr. Mark M. Lawson dated August 29 and August 31, 2005, attached as A-7, 8 and A-9, 10, respectively.) *Amicus Curiae*, therefore, is filing concurrently with this Brief a motion pursuant to Rule 84.05(f)(3).

JURISDICTIONAL STATEMENT

Amicus Curiae Product Liability Advisory Council adopts Relator's Jurisdictional Statement.

STATEMENT OF FACTS

Amicus Curiae Product Liability Advisory Council adopts Relator's Statement of Facts.

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POINTS RELIED ON

POINT RELIED ON NO. 1: RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING THE OCTOBER 12, 2004 AND FEBRUARY 25, 2005 ORDERS REQUIRING BP TO PRODUCE APPROXIMATELY 200,000 E-MAILS BECAUSE THE ORDERS VIOLATED MISSOURI DISCOVERY RULES IN THAT THEY WOULD FORCE BP TO PRODUCE IRRELEVANT DOCUMENTS.

Missouri Rule of Civil Procedure 56.01

State ex rel. Woytus v. Ryan, 776 S.W.2d 389 (Mo. banc 1989)

POINT RELIED ON NO. 2: RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING THE OCTOBER 12, 2004 AND FEBRUARY 25, 2005 ORDERS REQUIRING BP TO PRODUCE APPROXIMATELY 200,000 E-MAILS BECAUSE THE ORDERS VIOLATED MISSOURI DISCOVERY RULES IN THAT THEY WOULD FORCE BP TO PRODUCE DOCUMENTS WITHOUT FIRST HAVING AN OPPORTUNITY TO WITHHOLD FROM PRODUCTION THOSE DOCUMENTS PROTECTED FROM DISCLOSURE BY THE ATTORNEY-CLIENT PRIVILEGE.

State ex rel. Peabody Coal Co. v. Clark, 863 S.W.2d 604 (Mo. 1993)

State ex rel. Great American Ins. v. Smith, 574 S.W.2d 379 (Mo. 1978)

State ex rel. Polytech, Inc. v. Voorhees, 895 S.W.2d 13 (Mo. 1995)

In re Dow Corning Corp., 261 F.3d 280 (2d Cir. 2001)

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<u>POINT RELIED ON NO. 3</u>: RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING THE OCTOBER 12, 2004 AND FEBRUARY 25, 2005 ORDERS REQUIRING BP TO PRODUCE APPROXIMATELY 200,000 E-MAILS BECAUSE THE ORDERS WOULD VIOLATE THE LONG-STANDING PUBLIC POLICIES OF PROTECTING THE PROPERTY AND PRIVACY RIGHTS HELD BY BP AND ITS EMPLOYEES.

Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427 (1991)

Seattle-Times Co. v. Rhinehart, 467 U.S. 20 (1984)

Munden v. Harris, 134 S.W. 1076 (Mo. App. 1911)

Missouri Rule of Civil Procedure 56.01

<u>POINT RELIED ON NO. 4</u>: ALTERNATIVELY, IF THIS COURT HOLDS THAT SOME OF THE 200,000 E-MAILS ARE SUBJECT TO DISCOVERY, BP MUST BE GIVEN A REASONABLE OPPORTUNITY TO REVIEW THE E-MAILS TO PROTECT FROM DISCLOSURE DOCUMENTS THAT ARE IRRELEVANT OR PRIVILEGED, AND THE OPPORTUNITY TO PROTECT PRIVACY, PROPERTY AND THE CONFIDENTIALITY AND PRIVACY INTERESTS OF BP AND ITS EMPLOYEES. THE COSTS OF ANY SUCH REVIEW AND PRODUCTION SHOULD BE SHIFTED TO OR SHARED WITH THE SEEKING PARTY.

Zubulake v. UBS Warburg LLC, et al., 217 F.R.D. 309 (S.D.N.Y. 2003)

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SEDONA PRINCIPLES: *Best Practices Recommendations & Principles for Addressing Electronic Document Production*, Principle 11 (January 2004)

Multitechnology Service LP v. Verizon, 2004 WL 1553480 (N.D. Tex. 2004)

Zubulake v. UBS Warburg, 217 F.R.D. 309 (S.D.N.Y. 2003)

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ARGUMENT

I. INTRODUCTION

Society is riding a wave of electronic innovation. Corporations and individuals must navigate the rapid developments in electronic communications to remain viable and competitive. Despite new advances in the manner of business operations and computer communication, traditional legal principles and longstanding procedural safeguards cannot be forgotten. That is what happened in this case.

Resolving developing issues relating to electronic discovery will permit this Court to provide stability and predictability to the bench, bar, businesses, and the public. Manufacturers and business owners, large and small, run their businesses by using electronic documents and need guidance from Missouri courts regarding electronic discovery issues. This *Amicus* brief identifies the need for clarification and direction in this area and asks that this Court's preliminary writ be made permanent to protect substantive and procedural rights and reasonable business expectations.

Businesses are increasingly run by means of electronic data and communication. It is estimated that more than 90% of all documents are now created and stored in an electronic format, and most of this is never reduced to paper.[1] There are 980

[1] THE SEDONA PRINCIPLES: *Best Practices Recommendations & Principles for Addressing Electronic Document Production* (January 2004) (available at http://www.thesedonaconference.org/publication.html); *Thompson v. United States*

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million active e-mail accounts around the world, and 40 percent of those are corporate accounts.[2] A University of California Berkeley study estimates that corporations will generate more than 17.5 trillion electronic documents annually.[3] Much of what an individual employee generates is now created on a computer in an individual office or cubicle or from distant locations. This data takes many different forms—e-mail messages, word processing documents, spreadsheets, PowerPoint® presentations, graphics, and complex databases. Individual employees generally name and store these files without regard to any organizational naming convention and without regard to litigation-based discovery requests that may be propounded years in the future.

To determine the content of information contained within an individual's electronic files requires either an electronic page-by-page review or complex processing by an electronics vendor using key word, character, phrase searches or complicated linguistic "concept" searches. Once those searches are conducted, a vendor must "process" the files to provide some structure to the mass of documents to allow analysis

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Department of Housing and Urban Dev., 219 F.R.D. 93, 96 (D.Md. 2003) (citations omitted).

[2] http://itmanagement.earthweb.com/secu/article.php/3349921.

[3] Peter Lyman & Hal Varian, *"How Much Information?"* (2000) at http://info.berkeley.edu/how-much-info.

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of its content. A single electronic document can only be viewed with a software program to "translate" the electronic data into readable form.[4]

A more significant challenge is the sheer scope and size of electronic information storage. An individual employee who previously could have only stored thousands of pages in paper form can now easily store tens of millions of pages on computer hard drives or other computer storage devices. Electronic mail volume is exponentially increasing.[5] "E-mails have replaced other forms of communication besides just paper-based communication. Many informal messages previously relayed by telephone or at the water cooler are now sent through e-mail systems." *Byers v. Illinois State Police*, 53 Fed.R.Serv.3d 740; 2002 WL 1264004 at *10 (N.D.Ill. 2002).

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[4] Electronic documents are stored in a series of binary codes, essentially zeros and ones. For example, the letter "F" is actually "101" in the actual computer file. *See* Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task*?, 41 B.C. L.Rev. 327, 335 (2000).

[5] Microsoft Corporation, in comments submitted to the Committee on Federal Rules considering changes to account for electronic discovery issues, stated that the amount of e-mail Microsoft received in 2004 was roughly double what it received in 2003. In 2004, Microsoft received 200-250 million e-mail messages a month from outside the company and 60-90 million internally. *See* December 16, 2004 comments from Greg McCurdy, on behalf of Microsoft Corporation, http://www.uscourts.gov/rules/e-discovery/04-CV-001.pdf.

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An individual employee's typical computer hard drive holds 80 to 100 gigabytes of storage space. Depending on the software used, a single "gigabyte" of data is roughly equivalent to 100,000 to 500,000 pages.[6] The storage capacity for corporate computer servers are measured in "terabytes." One terabyte is one thousand times larger than a gigabyte.[7] At a minimum, a terabyte of e-mail is equivalent to approximately 100,099,000 pages. To print a single terabyte of data would require 50,000 trees to be made into paper.[8] In 2004, e-mail generated about 400,000 terabytes of new information worldwide.[9] Thus, identifying, locating, and recovering relevant electronic files may be extraordinarily costly and time consuming depending on the scope of the legal issues, the discovery requests, and the number of employees or departments having electronic information potentially relevant to a particular lawsuit.

Because of the nature and use of computers, a file that may be relevant in a given case may be maintained within the same folder as many other files that have no relevance whatsoever. *See Lipco Elec. Corp. v. ASG Cons. Corp.,* 4 Misc.3d 1019(A);

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6 Manual for Complex Litigation (Fourth) § 11.446 (2004); http:// www.lexisnexis.com/ applieddiscovery/lawlibrary/whitePapers/ADI_FS

7 http://www.pcsndreams.com/Pages/Articles/Megabytes.htm; http://www.urmc.rochester.edu/smd/education/oer/Tips1.cfm

8 http://www.sims.berkeley.edu/research/projects/how-much-info-2003/execsum.htm

9 *Id.*

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2004 WL 1949062 at *8 (N.Y.Sup. 2004) (stating that unlike paper records, many electronic records are not kept because they have value or are necessary but, rather, because it is easy to store and cost of storage is nominal). And although paper records are generally stored in a retrievable form, this is not true of electronic records. *Byers* 2002 WL 1264004 at *10 (finding that unlike most paper-based discovery, archived e-mails typically lack any coherent filing system).

Many of these irrelevant files likely also include personally sensitive or confidential information. Employees frequently save personal information on their work computers, including health, financial, tax, credit card, and other information. These files co-exist with other files on the same computer and frequently within the same folder as business-related documents. E-mails are often not segregated by subject matter, and sensitive messages co-exist with privileged messages, spam, jokes, lunch invitations, correspondence to and from children's schools, administrative planning, along with potentially relevant business communications. By its convenient and quick nature, e-mail is an informal method of communication that is often used to express first impressions, vent frustration, immediately respond to events, or otherwise "blow off steam." Such e-mails may not reflect the true actions or decision-making of the creator or business. E-mail has, in short, replaced the telephone.[10]

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[10] 1998 Survey of American Management Association (finding that e-mail had already replaced the telephone as the primary means of business communication). http://www.amanet.org/research

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A single e-mail message may also have multiple large documents attached. Some of those attached documents may have been generated from different applications. One e-mail may have an attachment that is a document from a word processor and another attachment that is a spreadsheet and another attachment that is a PowerPoint® presentation or a digital picture or video. A single e-mail may thus be less than one page long or may contain individual attachments of several hundred pages each.

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POINTS RELIED ON

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Missouri Rule of Civil Procedure 56.01(b) outlines the proper scope of discovery: "**Unless otherwise limited** by order of the Court in accordance with these rules . . . Parties may obtain discovery regarding any matter, **not privileged**, that is **relevant** to the subject matter involved in the pending action . . ." Mo. R. Civ. P. 56.01(b) (emphasis added). Thus, the rule expressly allows the court to limit, but not expand, the scope of discovery permitted.

Application of this rule to the facts at hand demonstrates that the writ should be made permanent. BP had previously preserved and gathered thousands of electronic messages or "e-mails" and attachments to those messages that number in the millions of pages. From that universe, only some are relevant documents. And of the subset of relevant documents, some of those may be privileged and, therefore, not discoverable under the rule. Thus, the lower court's order requiring the full universe of these documents to be produced casts too wide of a net. The order did not allow adequate opportunity or time for a winnowing of that universe to those documents that were discoverable. Thus, the order was overbroad and improper. "[T]he need for discovery

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. . . must be balanced against the burden and intrusiveness involved in furnishing the information." *State ex rel. Woytus v. Ryan*, 776 S.W.2d 389, 391 (Mo. banc 1989).

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<u>POINT RELIED ON NO. 2</u>: RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING THE OCTOBER 12, 2004 AND FEBRUARY 25, 2005 ORDERS REQUIRING BP TO PRODUCE APPROXIMATELY 200,000 E-MAILS BECAUSE THE ORDERS VIOLATED MISSOURI DISCOVERY RULES IN THAT THEY WOULD FORCE BP TO PRODUCE DOCUMENTS WITHOUT FIRST HAVING AN OPPORTUNITY TO WITHHOLD FROM PRODUCTION THOSE DOCUMENTS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.

If the preliminary writ is not made permanent, the trial court's February 25, 2005 order would fracture Missouri's bedrock attorney-client privilege. Under Rule 56.01(b), only non-privileged, relevant evidence is discoverable. The fundamental importance of the attorney-client privilege cannot be overstated. The attorney-client privilege protects "confidential communications between an attorney and client concerning representations of the client." *State ex rel. Polytech, Inc. v. Voorhees*, 895 S.W.2d 13, 14 (Mo. 1995). Because it protects the confidences of the client from disclosure to other parties or third persons, the attorney-client privilege encourages free and honest communication between attorney and client. *State ex rel. Great American Ins. v. Smith*, 574 S.W.2d 379, 383 (Mo. 1978). Stressing the importance of confidential communications between attorneys and their clients, the *Smith* court instructed:

> As long as our society recognizes that advice as to matters relating to law should be given by persons trained in the law that is, by lawyers[,] anything that materially interferes with

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> that relationship must be restricted or eliminated, and anything that fosters the success of that relationship must be retained and strengthened. The relationship and the continued existence of the giving of legal advice by persons accurately and effectively trained in the law is of greater societal value, it is submitted, than the admissibility of a given piece of evidence in a particular lawsuit.

Smith, 574 S.W.2d at 383. Because open communication between an attorney and a client is a paramount policy concern, the attorney-client privilege is deemed absolute except in the most extraordinary of circumstances. *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.2d 364, 366 n.2 (Mo. banc 2004).

To preserve the attorney-client privilege, parties must assert privilege objections before producing the privileged material. Once the material or information is disseminated to third parties, the privilege is waived. *See State ex rel. Peabody Coal Co. v. Clark*, 863 S.W.2d 604, 608 (Mo. 1993) (acknowledging that "once the privilege is discarded and the privileged material is produced, the damage to the party against whom discovery is sought is both severe and irreparable"); *State ex rel. Faith Hospital v. Enright*, 706 S.W.2d 852, 855 (Mo. 1986) (regarding production of documents subject to privilege objections: "once the proverbial bell has been rung, its sound can neither be recalled or subsequently silenced").

In this case, the trial court ordered BP to produce approximately 200,000 e-mails without first allowing BP sufficient time to review the e-mails for privilege.

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Recognizing that compliance with this order would likely result in the production of privileged information, the trial court attempted to offer some means of protection in a footnote:

> With respect to those e-mails that Defendant [BP] refers to as the approximately '200,000 additional' e-mails . . . these documents must be produced, but by producing the materials, BP will not waive any objections based at trial on the attorney/client privilege as to any privileged document that may be included in such production, nor any objections as to relevancy.

See trial court's February 25, 2005 Order, p. 3, n. 1. The offer, however, is of no legal value. The trial court failed to recognize that waiver would be triggered at the time of production, not trial. *See In re Dow Corning Corp.*, 261 F.3d 280, 282-83 (2d Cir. 2001). The preservation of a trial objection is ultimately of no help when analyzing a privilege waiver.

By ordering BP to produce the e-mails, which likely contain privileged information, the trial court has disregarded the Missouri Rules of Civil Procedure and long-standing Missouri precedent regarding discovery of privileged materials. The trial court has no authority to force BP to waive its privilege objections by ordering production of privileged materials. *See id.* at 282-83 (finding that compelled disclosure of privileged information, absent waiver or applicable exception, is contrary to well-established precedent). As set forth above, the attorney-client privilege is absolute and

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cannot be overcome except by waiver. Here, BP has not waived its privilege objections with respect to any attorney-client communications contained in the e-mails it has been ordered to produce. To the contrary, BP has adamantly opposed the trial court's order at every turn to avoid the danger of producing and thereby waiving its privilege rights.

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<u>POINT RELIED ON NO. 3</u>: RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING THE OCTOBER 12, 2004 AND FEBRUARY 25, 2005 ORDERS REQUIRING BP TO PRODUCE APPROXIMATELY 200,000 E-MAILS BECAUSE THE ORDERS WOULD VIOLATE THE LONG-STANDING PUBLIC POLICIES OF PROTECTING THE PRIVACY AND PROPERTY RIGHTS HELD BY BP AND ITS EMPLOYEES.

A. The Trial Court's Order Jeopardizes Privacy Rights and Therefore Violates Public Policy

Harvard Law Professor Arthur R. Miller, the eminent national authority on civil procedure, has written:

> Privacy and property ownership are among the most fundamental rights we have as citizens of this country . . . Totally unconstrained discovery, especially when it has little or no value in determining the merits of a lawsuit, provides a widespread and serious threat to these rights.

Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 475 (1991). The United States Supreme Court has recognized that today's liberal discovery rules allow "extensive intrusion into the affairs of both litigants and third parties." *Seattle-Times Co. v. Rhinehart*, 467 U.S. 20, 30 (1984). Likewise, Missouri courts cautioned that "discovery may seriously implicate the privacy

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interests of litigants and third parties." *State ex rel. Missouri Ethics Commission v. Nichols*, 978 S.W.2d 770, 772 (Mo. Ct. App. 1998).

Missouri recognized the right of privacy in *Munden v. Harris*, explaining "It may be admitted that the right to privacy is an intangible right; but so are numerous others which no one would think of denying to be legal rights. . . ." 134 S.W. 1076, 1078 (Mo. App. 1911). In analyzing whether confidential information is discoverable, Missouri courts should balance the "need of the interrogator to obtain the information against the respondent's burden in furnishing it. Included in this burden may well be the extent of an invasion of privacy, particularly the privacy of a non-party." *State ex rel. Wright v. Campbell*, 938 S.W.2d 640, 643 (Mo. Ct. App. 1997) (quotations omitted). Before a party seeking confidential information through discovery is deemed entitled to such information, the party must first show the information is relevant and it has a specific need for the information to prepare for trial. *Id.* Absent such a showing, a party should be denied access to private, confidential information to preserve the privacy rights of the opposing party. *Id.*

Although not a relevant concern in this case, in general, if such private and confidential material is disclosed in discovery, "absent an agreement between the parties or an order to the contrary, a party is free to share the fruits of discovery obtained during litigation with others who are not parties to the lawsuit." *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 683-84 (5th Cir. 1985). Sharing information and documents received through discovery is common among attorneys. Attorneys share information to learn about litigants or issues about which they may otherwise know very little. Attorney groups

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from both the plaintiffs' bar and the defense bar host websites where information can be easily, quickly, and irretrievably shared and disseminated. A litigant or third-party who has disclosed private or confidential information would have no protection against the dissemination of the information over the internet or other domains, to individuals or groups related or unrelated to the litigation at issue. For these reasons, it is essential that before ordering confidential information produced, the party seeking the information establishes both its relevance and need for trial preparation. *State ex rel. Wright*, 938 S.W.2d at 643.

If not overturned, the trial court's ruling would violate corporate and individual employees' privacy rights. The court has ordered 200,000 e-mails—with attachments—to be produced, without first affording BP an opportunity to review the documents for either relevance or privilege. If the trial court's order is not overturned, not only would the privacy rights of BP employees be violated, but also the privacy rights of individuals throughout the State of Missouri would be in jeopardy.

Many employees across the world send personal and confidential e-mail messages using their company e-mail systems. Employee e-mail may contain personal and private information that is irrelevant to the legal issues. Credit card numbers, tax, financial or health information, and messages to loved ones, neighbors, friends, and

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others reside in the collections of e-mail systems in companies everywhere. Such irrelevant, private, and confidential information should be excluded from production.[11]

The fact that relevant, non-privileged documents are naturally commingled with irrelevant, confidential, trade secret, personal, and privileged documents requires that some reasonable procedures be established to protect certain documents from disclosure. Because of the large volume of such commingled information, an appropriate review for content, relevance, privilege, confidentiality, and privacy requires time, physical space, and trained personnel. Even cases involving relatively minor damages can require the collection and review of hundreds of thousands or even millions of pages of e-mail and other electronic documents. Despite electronic searching software to aid in filtering records, in the end, human review of each document is still required to determine

[11] An order requiring the production of confidential information, such as health information, may force some businesses to violate state and other laws. *See State ex rel. Brown v. Dickerson*, 136 S.W.3d 539 (Mo. Ct. App. 2004) (discussing the physician-patient privilege codified under Mo. Rev. Stat. § 491.060(5), which prohibits the production of medical records absent waiver by the patient); *Bradford v. Semar*, 2005 WL 1806344 (E.D.Mo. 2005) (discussing the Health Insurance Portability and Accountability Act ("HIPAA"), which provides for civil and criminal penalties for the unauthorized disclosure of private health information.)

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responsiveness and privilege. These realities require appropriate opportunities to reasonably prepare a large volume of documents for production in a legal matter.

Here, the BP was not afforded to allow ample time to review documents for confidential information. However, assuming some of the documents ordered produced contained confidential information, which is likely considering the number of documents involved, Plaintiffs were under a burden to show the confidential information was relevant to the present case. Missouri protects confidential information from disclosure absent a showing of relevance. Mo. R. Civ. P. 56.01(b). Without this protection, litigants would have unfettered access to discover an individual's most private information, regardless of the potential embarrassment to the producing party or worse, potential misuse of such information by the opposing party.

Plaintiffs choose whether to bring a lawsuit and place their confidential information at issue. Individual defendants, corporate defendants, and their employees, on the other hand, do not "choose" whether to be involved in litigation. The law nonetheless protects the privacy rights of those who do not choose to be litigants, just as it protects the rights of those who do those who do. As acknowledged by Professor Miller, "Litigants do not give up their privacy rights simply because they have walked, voluntarily or involuntarily, through the courthouse door." 105 Harv. L. Rev. 427, 466. If Missouri fails to protect the privacy rights of its litigants, whether plaintiff or defendant, the discovery process would be rife with abuses.

B. The Trial Court's Order Jeopardizes Property Rights and Therefore Violates Public Policy

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Although the trial court conceded that privileged documents were likely among the materials BP was ordered to produce, its proffered "protection" of those documents was inadequate. Missouri courts recognize that "discovery may seriously implicate the privacy interests of litigants and third parties" and, therefore, the courts must have "implicit power to use protective orders to preserve confidentiality and protect against public disclosure." *State ex rel. Missouri Ethics Commission v. Nichols*, 978 S.W.2d 770, 772 (Mo. Ct. App. 1998). Missouri Rule of Civil Procedure 56.01(c), provides:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .

In *Seattle-Times*, 467 U.S. 20 (1984), the Court addressed Fed. R. Civ. P. 26(c), which mirrors Missouri Rule 56.01. The Court found "although the Rule contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule." Likewise, Missouri courts are bound by Rule 56.01 to protect the privacy rights of litigants and third parties subject to Missouri's discovery rules.

The trial court's order jeopardizes the property rights of corporations involved in litigation in Missouri. Corporate confidential information has been defined

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as "a species of property to which the corporation has exclusive right and benefit." *Carpenter v. U.S.*, 484 U.S. 19, 25 (1987). As Professor Arthur Miller stated:

> In today's business world, commercial information often has a value that is tangible enough to be bought and sold for huge sums of money, and extraordinary efforts are expended to control it and to maintain its security and confidentiality.

105 Harv. L. Rev. 427. Businesses have property rights not only in trade secrets, but in other confidential and proprietary business data as well. *State ex rel. Wright v. Campbell*, 938 S.W.2d 640, 634 (Mo. Ct. App. 1997); Mo. R. Civ. P. 56.01(c)(7). To maintain a competitive edge, "business entities must be able to protect sensitive information." Michael Hoenig, *Protective Confidentiality Orders*, N.Y.L.J. Mar. 5, 1990, at 7.). Disclosure of certain information could unjustifiably damage the reputation, profitability, and the viability of a corporation. 105 Harv. L. Rev. 427, 470.

In *State ex rel. Blue Cross and Blue Shield v. Anderson*, 897 S.W.2d 167 (Mo. Ct. App. 1995), the Missouri Court of Appeals considered whether certain pricing arrangements between Relator (Blue Cross and Blue Shield) and hospitals in Southwest Missouri were subject to discovery. After determining the information sought was confidential and that Relator could be harmed by disclosure of the information, the court recognized the burden falls on the requesting party:

> The party seeking production of documents, which contain trade secrets or confidential information, must establish that

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the documents are relevant and that it has a specific need for the documents in order to prepare for trial.

Id. at 170. After a careful analysis, the court found the requested information was not relevant to the litigation and, therefore, not discoverable. *Id.* at 171. *See also Campbell*, 938 S.W.2d 640 (finding confidential and proprietary information not relevant and therefore not discoverable).

The trial court's order in this case would force BP to divulge information, some of which may contain commercially-sensitive, confidential information, without an opportunity to review the requested documents for such information. *See State ex rel. Blue Cross and Blue Shield*, 897 S.W.2d at 170 (acknowledging the harm of disclosing confidential, proprietary information).

The effect of the trial court's order in this case would be devastating to businesses and corporations involved in litigation in Missouri. Disclosure of trade secrets or other proprietary information creates the risk of undermining the confidentiality of research and development and threatens a company's investments. *See Kewanee Oil Co. v. Bicron*, 416 U.S. 470, 485-86 (1974) (finding that investment in research and development hinges on maintaining the confidentiality of the resulting information). The public policy underpinning the protection afforded to confidential and proprietary business information is particularly significant. If companies in the United States are at risk of having their trade secrets or other confidential research subject to discovery, these companies may be unable to compete against foreign businesses. 105 Harv. L. Rev. 427, 473.

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Before ordering BP to produce the subject e-mails, the trial court failed to permit BP an adequate opportunity to review the e-mails for confidential or proprietary business information. BP should have been afforded a reasonable time to review the documents for relevance, privilege, confidentiality, proper redactions, production, tracking, and to compile a privilege and redaction log. If the documents ordered produced did include such information, the court was required to find that the information was relevant and that Plaintiff had a specific need for the information before ordering disclosure.

In this case, without having the opportunity to review for confidential, privileged and other protected information, BP is at risk of producing proprietary business information as well as confidential information of its employees. Likewise, if all electronic documents are subject to production without adequate time for a proper review or without the benefit of technological search and filtering tools, individuals and businesses would lose fundamental privacy and property rights and the costs would become so staggering that settlement of marginal or frivolous cases would be far less expensive. If courts take the related step and permit discovery on discovery, without a valid showing of need, the focus of the litigants and the court will be on electronic discovery methods, directions and legal advice, rather than on the merits of the case. In addition, costs would increase, privileged matter, private documents and confidences would be exposed, and businesses will be forced to change their regular business operation for reasons other than for efficiency or client service. Trial courts have an obligation to prevent litigants from misusing discovery to force an adversary to capitulate

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and settle a case or to harass or intimidate others. *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325, 327-28 (Mo. Ct. App. 1985); *Misischia*, 30 S.W.3d at 864; *VBM Corp., Inc. v. Marvel Enterprises Inc.*, 842 S.W.2d 176, 180 (Mo. Ct. App. 1992). Clear, reasoned and sound guidance from this Court will greatly aid the many Missouri citizens and businesses who may find themselves involved in legal matters involving electronic documents. This Court should make its preliminary writ of prohibition permanent because the trial court's order jeopardizes the privacy and property rights of BP and its employees.

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POINT RELIED ON NO. 4: **IF THIS COURT HOLDS THAT SOME OF THE 200,000 E-MAILS ARE SUBJECT TO DISCOVERY, BP MUST BE GIVEN A REASONABLE OPPORTUNITY TO REVIEW THE E-MAILS TO PROTECT FROM DISCLOSURE DOCUMENTS THAT ARE IRRELEVANT OR PRIVILEGED, AND THE OPPORTUNITY TO PROTECT THE PRIVACY, PROPERTY AND CONFIDENTIALITY INTERESTS OF BP AND ITS EMPLOYEES. THE COSTS OF ANY SUCH REVIEW AND PRODUCTION SHOULD BE SHIFTED TO OR SHARED WITH THE SEEKING PARTY.**

A. Costs Associated With Electronic Discovery

Claims are easy to bring, but determining the truth is expensive. As one court notes, "The more information there is to discover, the more expensive it is to discover all the relevant information until, in the end, 'discovery is not just about uncovering the truth, but also about how much of the truth parties can afford to discover.'" *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) (citing *Rowe Entertainment v. William Morris Agency*, 205 F.R.D. 421, 423 (S.D.N.Y. 2002)).

Identifying and collecting potentially relevant electronic records can be extraordinarily costly depending on the volume and manner of the electronic records. Processing electronic records into a format that permits review requires time and expense. A thriving electronic discovery industry is developing to expedite the processing of electronic records and to develop systems that may ultimately reduce costs. In time, perhaps large volumes of disparate electronic records can be reviewed so that

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relevant, non-privileged records may produced more quickly. Processing prices vary among vendors, but twenty-three cents a page is a conservative estimate for basic vendor processing of electronic records.[12] After vendors process the electronic files into a review system, those electronic records must still be reviewed by a legal professional for relevance and privilege. Using sophisticated search terms or other technology to identify those documents that can clearly be eliminated greatly reduces the time and cost of attorney review.

For example, in a recent case involving 30,000 e-mail messages and other electronic records, the cost of gathering and producing the electronic records was $32,338.29, and the cost for attorney review of the electronic records was $249,234.50. *BASF FINA Petrochemicals Ltd. v. H.B. Zachry Co.*, 2004 WL 2612835 at *1 (Tex. App. 2004).

It is entirely proper to use key word search technology to reduce the number of electronic messages requiring review. *See, e.g., Zubulake v. UBS Warburg LLC*, 2004 WL 1620866 at *8 (S.D.N.Y. 2004) *(Zubulake V)*. The Sedona Principles state: "A responding party may satisfy its good faith obligation to preserve and produce potentially responsive electronic data and records by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data most likely to contain responsive information." SEDONA PRINCIPLES: *Best Practices Recommendations & Principles for Addressing Electronic Document Production,*

[12] http://www.lexisnexis.com/applieddisocvery/clientresources/techtips7.asp.

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Principle 11 (January 2004).[13] To hold otherwise would extend the time, increase the costs, and impede the search for truth in litigation.

In this case, the 200,000 e-mails were excluded as irrelevant by using key word searching. Assuming a very conservative average of 3½ pages per e-mail – without regard to any attachments to those e-mails – would total about 700,000 pages that would need to be reviewed for responsiveness and privilege. One legal professional reviewing 100 pages per hour would need 7,000 hours – or 875 business days – to review the universe of documents. In many businesses, due to the number and size of attachments, the average number of pages per e-mail could easily exceed 20 pages. Accordingly, the number of pages to be reviewed, and the number of people needed to review the documents, would need to be drastically increased. In addition, the corresponding costs present another opportunity for the seeking party to exert improper leverage against the producing party.

B. Appropriate Procedures Are Necessary To Protect Parties from Unfair Discovery Tactics

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[13] The Sedona Principles for Electronic Document Production is a peer-reviewed publication from the Sedona Conference's Working Group on Best Practice for Electronic Document Retention and Production, the leading voice in clarifying and establishing guidelines and principles regarding e-discovery. This working group is comprised of some of the nations' finest lawyers, consultants, academics and jurists.

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A party with a significant quantity of electronic data who is served with broad, unlimited discovery requests may face a Hobson's choice: Either expend enormous amounts of money and effort preserving, collecting, reviewing, and producing electronic documents, or settle cases that are frivolous or questionable, which may only encourage new frivolous or questionable filings.

Cost sharing or shifting is a sound method for balancing electronic discovery demands. A Texas court recently determined that sharing the costs of obtaining large amounts of relevant electronic data would balance the need for the requesting party to seek only those electronic records it thought may be useful and would provide a strong incentive for the responding party to do what it could to reduce costs. *Multitechnology Service LP v. Verizon*, 2004 WL 1553480 at *2 (N.D. Tex. 2004). The *Verizon* court also classified the expense as court costs to be recovered by the prevailing party. *Id.*

Without help and guidance from the judiciary, parties with large amounts of electronic data can thus be legally "blackmailed" into settling non-meritorious cases or face the high costs of electronic preservation, collection, review and production with the additional risk and expense of a court's allowing a discovery on discovery "fishing expedition." A case weak on the merits could, if court protection is not afforded, become a case focused on the electronic document discovery process.

While less common in the paper-discovery world, this speculative "discovery on discovery" tactic appears to be increasing in the electronic discovery

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environment.[14] It is thus critical to remember that "the discovery provisions were not designed or intended for untrammeled use of a factual dragnet or fishing expedition." *Misischia v. St. John's Mercy Medical Center,* 30 S.W.3d 848, 864 (Mo. Ct. App. 2000). Permitting discovery on discovery without good cause risks the waiver of attorney-client privileged communications and the work product protected preservation, collection and review processes and attorney communications. The methods, directions and communications a party undertook to fulfill its duty to preserve, collect and review potentially relevant electronic records not only would **not** fall within the scope of Rule 56.01, without some rational showing of relevance or impropriety, but would also be

[14] The electronic data spoliation cases are instructive. Some result in sanctions that, in turn, create speculations and unreasonable expectations: that is, if a party is only allowed to examine the other party's methods of preserving, collecting and reviewing electronic discovery, then the value of the case and the settlement leverage may increase drastically. *See, e.g., Zubulake* (resulting in four e-discovery opinions that did not involve the substantive gender discrimination issues). *Zubulake* may be misused as rationale for baseless discovery on the e-discovery process. However, the first *Zubulake* decision notes that the court must first find a basis for such inquiries. In that case, UBS produced 100 company e-mails yet Ms. Zubulake produced 450 company e-mails that she had maintained. *Zubulake v. UBS Warburg*, 217 F.R.D. 309, 312-13 (S.D.N.Y. 2003).

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protected from discovery by both the attorney-client privilege and work product protections.

Under the paper paradigm, without a strong showing of relevance, it would not be proper to ask who looked for potentially relevant paper records, which boxes, drawers or file cabinets they searched, or inquire into the mental processes the reviewer utilized to determine if a paper record was potentially relevant. Yet, the preservation, collection and review of electronic records is becoming the new "fishing grounds" for those who seek to bolster the value of their case or create improper leverage by seeking speculative "discovery on discovery." This tactic is utilized by requesting parties in an attempt to raise the costs of litigation or in the hope that, by "fly-specking" the process, some deficiency may be found to support a spoliation claim. "The discovery process was not designed to be a scorched earth battlefield upon which the rights of the litigants and the efficiency of the justice system should be sacrificed to mindless overzealous representation of plaintiffs and defendants." *State ex rel. Madlock v. O'Malley*, 8 S.W.3d 890, 891 (Mo. banc 1999). The trial court's order creates that risk that businesses' electronic discovery processes will be the subject of litigation, rather the substantive clams underlying the plaintiffs' claim. For this reason, this Court's preliminary writ should be made permanent.

CONCLUSION

For these reasons and for the reasons set forth in BP's Petition for Writ of Prohibition, or in the Alternative, Petition for Writ of Mandamus, *Amicus curiae* PLAC requests that this Court make the preliminary writ absolute and prohibit Judge Riley from

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enforcing his October 12, 2004 and February 25, 2005 Orders. *Amicus curiae* prays for additional relief as deemed proper by this Court.

Respectfully submitted,

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CERTIFICATE OF VIRUS-FREE COMPUTER DISKETTE AND CERTIFYING WORD COUNT

The undersigned certifies that a copy of the computer diskette containing the full text of Brief *Amicus Curiae* of the Product Liability Advisory Council, Inc. In Support of Relator is attached to the Brief and has been scanned for viruses and is virus-free.

Pursuant to Mo.R.Civ.P. 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 7,801 words, as calculated by the Microsoft Word software used to prepare this brief

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RESPONDENT

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IN THE SUPREME COURT OF MISSOURI

SC 086712

STATE OF MISSOURI ex rel. AMOCO OIL COMPANY, now known as BP PRODUCTS NORTH AMERICA INC.,

Relator/Defendant,
vs.

THE HONORABLE JOHN J. RILEY
CIRCUIT JUDGE, 22nd JUDICIAL CIRCUIT, MISSOURI,

Respondent.

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